

## CHAPTER 5

# COURTS-MARTIAL PROCEDURES

Courts-martial procedures differ according to the type of court. A summary court-martial has a simple procedure and is convened to try relatively minor offenses. A special court-martial is used to try serious offenses beyond the scope of a summary court-martial but not serious enough for trial by a general court-martial. The major differences in types of courts-martial are the maximum punishments adjudged and the manner in which you prepare the records of proceedings.

This chapter examines the types of courts-martial, the procedures used, and other matters that occur before and during a trial. In our discussion of trial methods, we will consider each court-martial separately. Now, let's take a look at the summary court-martial.

### THE SUMMARY COURT-MARTIAL

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**LEARNING OBJECTIVES:** Describe the creation of the summary court-martial and the preferral and referral of charges. Explain pretrial preparation and court procedures for the summary court-martial.

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A summary court-martial is the least formal of the three types of courts-martial and the least protective of individual rights. The summary court-martial is a streamlined trial process involving only one officer, who performs the duties of prosecutor, defense counsel, judge, and jury. The purpose of the summary court-martial is to dispose of relatively minor offenses. One officer is assigned to perform the various roles. Since the summary court-martial affords the least protection for rights of the accused, the maximum punishment that this court can award is limited. Furthermore, only enlisted personnel who consent may be tried by summary court-martial.

The summary court-martial has no civilian equivalent. It is strictly a creature of statute within the military system. While it is a criminal proceeding, and technical rules of evidence apply and a finding of guilty can result in loss of liberty and property, there

is no constitutional right to representation by counsel. Therefore, it is not a true adversarial proceeding.

### CREATION OF THE SUMMARY COURT-MARTIAL

An individual must be authorized by law to convene a summary court martial. Article 24, *Uniform Code of Military Justice* (UCMJ); *Rules for Courts-Martial* (R.C.M.) 1302a; *Manual for Courts-Martial* (MCM) 1984; and *Judge Advocate General Manual* (JAGMAN) 0120c identify those persons who have the power to convene a summary court-martial. These individuals include any person who may convene a special or general courts-martial; or the Commander or Officer-in-Charge of any command when empowered by the Secretary of the Navy.

The authority to convene a summary court martial rests in the office of the authorized command rather than in the person of its commander. For example, Captain Doe, U.S. Navy, has summary court-martial convening authority while performing his or her duties as Commanding Officer, USS *Mississippi*. When Captain Doe goes on leave or is absent from his command for other reasons he or she loses that authority. Convening power cannot be delegated, and no subordinate may exercise such authority "by direction." When Captain Doe is on leave from his or her ship, the authority to convene passes to the temporary successor in command (usually the executive officer), who, in the eyes of the law, becomes the acting commanding officer.

Commanding officers or officers-in charge not empowered to convene a summary court-martial may request such authority by following the procedures contained in JAGMAN 0121b.

### Restrictions on Authority to Convene

Unlike the authority to impose non-judicial punishment, a superior commander may restrict the power to convene a summary court-martial. Further, a commander of a unit attached to a ship should, as a matter of policy, refrain from exercising his or her

summary-court-convening powers. He or she should refer such cases to the commanding officer of the ship for disposition while the unit is embarked. This policy does not apply to commanders of units that are embarked for transportation only. When an individual has already been tried by a state or foreign court, permission must be obtained from the officer exercising general court-martial jurisdiction before imposition of non-judicial punishment or referral to summary court-martial. Offenses that have already been tried in a court deriving its authority from the United States (U.S. District Courts) may not be tried by courts-martial.

If the convening authority or summary court-martial officer is the accuser, it is discretionary with the convening authority as to whether to forward the charges to a superior with a recommendation to convene the summary court-martial or convene the court himself. If the summary court officer is the accuser, the jurisdiction of the summary court is not affected.

### **Mechanics of Convening**

Before any case can be brought before a summary court-martial, it must be properly convened. The summary court is created by order of the convening authority detailing the court-martial officer to the court. The convening order will specify that it is a summary court and appoint the summary court-martial officer. Additionally, the convening order may designate where the court-martial will meet. If the convening authority derives his or her power from designation by SECNAV, this information is included in the order. Each convening order is assigned a court-martial convening order number. The convening authority personally signs the convening order showing his or her name, grade and title, including organization and unit.

The *MCM*, 1984 authorizes the convening authority to convene a summary court-martial by a notation on the charge sheet when signed. However, the better practice is to use a separate convening order for the summary court-martial. Appendix 6b of the *MCM*, contains a suggested format. We will have another look at convening orders later in this manual.

### **Summary Court-Martial Officer**

A summary court-martial requires only one officer. As a jurisdictional prerequisite, this officer must be a commissioned officer on active duty and of

the same armed force as the accused. (The Navy and Marine Corps are part of the same armed force.) Where practical, the officer's grade should not be below O-3. Age, education, experience, and judicial temperament are qualifications for the summary - court-martial officer, as his or her performance will have a direct impact upon the morale and discipline of the command. When more than one commissioned officer is present within the command or unit, the convening authority may not serve as summary court officer. When the convening authority is the only commissioned officer in the unit, he or she may serve as summary court-martial officer. This fact should be noted in the convening order and should be attached to the record of trial. When such a situation exists, the better practice is to appoint a summary court officer from outside the command. Note that the summary court-martial officer does not have to be from the same command as the accused.

Remember, the summary court-martial officer assumes the burden of prosecution, defense, judge, and jury. He or she must thoroughly and impartially inquire into both sides of the matter assuring that the interests of both the government and the accused are safeguarded and that justice is done. While the summary court-martial officer may seek advice from a judge advocate or legal officer on questions of law, the officer may not seek advice from anyone on questions of fact, since he or she has a duty to make these determinations independently.

### **Jurisdictional Limitations: Persons**

Article 20, *UCMJ*, and R.C.M. 1301(c) provide a summary court-martial the power (jurisdiction) to try only those enlisted person who consent to be tried. The right of an enlisted accused to refuse trial by a summary court-martial is absolute. A summary court-martial may not try commissioned officers, warrant officers, cadets, aviation cadets, midshipmen, and those not subject to the *UCMJ*.

### **Jurisdictional Limitations: Offenses**

A summary court has the power to try all offenses described in the *UCMJ* except those that require punishment beyond the maximum that can be imposed at a summary court-martial. For instance, a summary court cannot try capital offenses that involve the death penalty. Refer to R.C.M. 1004 for a discussion of capital offenses. A summary court-martial may dispose of any minor offense.

## PREFERRAL AND REFERRAL OF CHARGES

In this section, we will focus on the mechanism for properly bringing a case to trial before a summary court-martial. Referral is the basic process by which you send a case to a particular type of court-martial. Preferral is when charges are formally made.

### Preliminary Inquiry

Every court-martial case begins with a complaint by someone that a person subject to the *UCMJ* has committed an offense that results in the discovery of misconduct. The officer exercising immediate non-judicial punishment authority over the accused has the duty to make, or cause to be made, an inquiry into the truth of the complaint or apparent wrongdoing.

### Preferral of Charges

Charges are formally made against an accused when signed and sworn to by a person subject to the *UCMJ*. This procedure is known as preferral of charges. You prefer charges by executing the appropriate portions of the charge sheet, DD Form 458. There are several steps involved in this preferral process. They are:

1. Personal data. Complete Block I of page 1 of the charge sheet first. You can find the information relating to personal data in the pertinent portions of the accused's service record.

2. The charges. Next, you complete Block II of page 1 of the charge sheet indicating the precise misconduct involved in the case. Each punitive article found in Part IV, *MCM*, 1984 contains sample specifications. If the charges are so numerous that they will not all fit in Block II, place them on a separate piece of paper as Attachment A.

3. Accuser. The accuser is a person subject to the *UCMJ* who signs Item 11 in Block III at the bottom of page 1 of the charge sheet. The accuser swears to the truth of the charges and has the affidavit executed before an officer authorized to administer oaths. This step is important, as an accused has a right to refuse trial on unsworn charges.

4. Oath. The oath must be administered to the accuser and the affidavit must show that it was executed by a person with proper authority. As authorized by Article 136, *UCMJ*, judge advocates, staff judge

advocates, legal officers, law specialists, summary court-martial officers, adjutants, Marine Corps and Navy commanding officers, among others, may administer oaths to the accuser. Also authorized to administer oaths are officers certified by the Judge Advocate General of the Navy as counsel under Article 27, *UCMJ*, all officers in paygrade O-4 and above, executive officers, and administrative officers of Marine Corps aircraft squadrons. Often the legal officer will administer the oath regardless of who conducted the preliminary inquiry. When the charges are signed and sworn to they are "preferred" against the accused.

### Informing the Accused

Once formal charges have been signed and sworn to, the preferral process is complete. The preferred charges are then receipted for by the officer exercising summary court-martial jurisdiction over the accused. This officer or his or her designate should formally receipt for the preferred charges by completing the receipt section, Block IV, of the charge sheet. The purpose of this receipt certification is to stop the statute of limitations for the offense charged.

The next step is to inform the accused of the charges against him or her. The purpose of this step is to provide the accused with reasonable notice of an impending criminal prosecution. This action complies with standards of due process of law. The immediate commander is required to inform the accused of the following elements as soon as practicable:

1. the charges preferred against him or her;
2. the name of the person who preferred the charges; and,
3. the name of the person who ordered the charges to be preferred.

The person who gives notice to the accused executes Item 12 at the top of page 2 of the charge sheet. If not the immediate commander of the accused, the person signing on the signature line should state their rank, component, and authority. The law does not require a formal hearing to provide notice to the accused, but the charge sheet must show that notice was given.

When the accused is absent without leave at the time charges are sworn, it is permissible and proper to execute the receipt certification even though the accused cannot be advised of the existence of the charges. In such cases, attach a statement to the case file indicating the reason for the lack of notice. When

the accused returns to military control, notice should then be given.

## **Referral of Charges**

Once the charge sheet and supporting materials are presented to the summary court-martial convening authority and a decision made to refer the case to a summary court, it must be sent to one of the summary court-martials previously convened. The referral is executed personally by the convening authority. It explicitly details the type of court (summary, special or general) and the specific court to which the case is being referred. This procedure is concluded by completing Item 14, Block V, on page 2 of the charge sheet.

In addition, the referral on page 2 of the charge sheet should show any particular instructions applicable to the case. These instructions could include statements such as, "confinement is not an authorized punishment in this case," or any other instructions desired by the convening authority. If no instructions apply to the particular case, the referral should so indicate by use of the word "none" in the appropriate blank. Once the referral is properly executed, the case is "referred" to trial. The case file should then be forwarded to the proper summary court-martial officer for further action.

## **PRETRIAL PREPARATION**

After charges are referred to trial by a summary court, all case materials must be forwarded to the summary court-martial officer. He or she is then responsible for preparing the case for trial.

### **Preliminary Preparation**

Upon receipt of the charges and accompanying papers, the summary court-martial officer begins preparation for trial. The charge sheet is carefully examined, and all obvious administrative, clerical, and typographical errors are corrected. The summary court-martial officer must initial each correction made on the charge sheet. If there are so many errors as to require preparation of a new charge sheet, re-swearing of the charges and re-referral are required. If the summary court officer changes an existing specification to include any new person, offense, or matter not fairly included in the original specification, again, the new specification must be re-sworn and re-referred. The summary court-martial officer continues with his or her examination of the charge

sheet to determine the correctness and completeness of the information on pages 1 and 2.

## **Pretrial Conference with the Accused**

After initial review of the court-martial file, the summary court-martial officer meets with the accused in a pretrial conference. We will discuss the accused's right to counsel later in this chapter. If the accused elects representation by counsel, all dealings with the accused is through his or her counsel. Thus, the accused's counsel, if any, should be invited to attend the pretrial conference. At the pretrial conference, the summary court-martial officer follows the suggested guide found in appendix 9, MCM, 1984, and documents the fact that all applicable rights were explained to the accused.

**PURPOSE.—** The purpose of the pretrial conference is to provide the accused with information on the nature of the court-martial, the procedure to be used, and his or her rights with respect to that procedure. No attempt should be made by the summary court-martial officer to interrogate the accused or otherwise discuss the merits of the charges. The proper time to deal with the accusations against the accused is at trial. The summary court-martial officer should provide a meaningful and thorough briefing. It is most important that the accused fully understand the court-martial process and his or her rights pertaining to that process.

**ADVICE TO ACCUSED—RIGHTS.—** The summary court-martial officer should advise the accused of the following:

- The general nature of the charges.
- The fact that the charges have been referred to a summary court-martial for trial and the date of referral.
- The identity of the convening authority,
- The name of the accuser.
- The names of witnesses who may be called to testify and any documents or physical evidence that the summary court-martial officer expects to introduce.
- The accused's right to inspect the allied papers and personnel records immediately available.
- That during the trial the summary court officer will not consider any matters, including statements previously made by the accused, unless they are admitted in accordance with the military rules of evidence.

- The accused's right to plead not guilty or guilty.
- The accused's right to cross-examine witnesses and have the summary court-martial officer cross-examine witnesses on behalf of the accused.
- The accused's right to call witnesses and produce evidence with the assistance of the summary court-martial officer, if necessary.
- The accused's right to testify on the merits, or to remain silent with the assurance that no adverse inference will be drawn by the summary court-martial officer for such silence.
- If any findings of guilt are announced, the accused's right to remain silent, to make an unsworn statement, oral or written or both, to testify, and to introduce evidence in extenuation and mitigation.
- The accused's right to object to trial by summary court-martial.
- The maximum sentence that the summary court-martial officer may adjudge if the accused is found guilty of the offense(s) alleged.

Advice to accused should include the following maximum punishments that can be awarded at a summary court-martial.

**SUMMARY COURT-MARTIAL PUNISHMENTS.—** The maximum punishment at a summary court-martial is discussed in the following paragraphs.

**E-4 and Below.—** The jurisdictional maximum sentence that a summary court may adjudge in the case of an accused who, at the time of trial, is in paygrade E-4 or below extends to (1) reduction to the lowest paygrade; (2) forfeiture of 2/3 of 1-month's pay, not to be apportioned over more than 3 months; (3) a fine not to exceed 2/3 of 1 month's pay; (4) confinement not to exceed 1 month; (5) hard labor without confinement not to exceed 45 days (in lieu of confinement); and (6) restriction to specified limits for 2 months. If the accused is attached to or embarked in a vessel and is in paygrade E-3 or below, he or she may be sentenced to serve 3 days' confinement on bread and water/diminished rations and 24 days' confinement in lieu of 30 days' confinement.

**E-5 and Above.—** The jurisdictional maximum that a summary court can impose in the case of an accused who, at the time of trial, is in paygrade E-5 or above extends to (1) reduction, but only to the next inferior paygrade; (2) restriction to specified limits

for 2 months; and (3) forfeiture of 2/3 of 1 month's pay. Unlike non-judicial punishment, where an E-4 may be reduced to E-3 and then awarded restraint punishments imposed only upon an E-3 or below, at a summary court-martial an E-5 cannot be sentenced to confinement or hard labor without confinement, even if a reduction to E-4 has also been adjudged.

#### **ADVICE TO ACCUSED—COUNSEL.—**

While the *MCM*, 1984, creates no statutory right to provide a military defense counsel at a summary court-martial, it has created a limited right to civilian defense counsel. Therefore, the convening authority may still permit the presence of a counsel if the accused can obtain such counsel. The accused has a right to hire a civilian lawyer and have that lawyer appear at trial, if such appearance will not necessarily delay the proceedings and if military exigencies do not prevent it. The accused must, however, bear the expenses involved. If requested, the summary court officer should allow a reasonable time for the accused to retain a civilian counsel.

Even though an accused has no right to military counsel at a summary court-martial, if not given an opportunity to consult with counsel before accepting a summary court-martial, the summary court findings will be inadmissible at a later trial by court-martial. The term *independent counsel* means a lawyer qualified in the sense of Article 27(b), *UCMJ*, who in the course of regular duties does not act as the principle legal advisor to the convening authority.

To be admissible at a later trial by court-martial, evidence of a summary court-martial at which an accused was not represented by counsel must affirmatively demonstrate that

- the accused was advised of his or her right to confer with counsel prior to deciding to accept trial by summary-court martial;
- the accused either exercised his or her right to confer with counsel or made a voluntary, knowing, and intelligent waiver; and
- the accused voluntarily, knowingly, and intelligently waived his or her right to refuse a summary court-martial.

When an accused has been properly advised of the right to consult with counsel and to refuse a summary court-martial, the elections or waiver in this regard are made in writing and signed by the accused. Use a form

similar to that shown in figure 5-1 to record the advice/waiver. The "Acknowledgement of Rights and Waiver," properly completed, contains all the necessary advice to an accused. When it is properly executed it will establish a voluntary, knowing, and intelligent waiver of the accused's right to consult with counsel and/or his or her right to refuse trial by summary court-martial. A page 13 entry in the accused's service record should be made, and a copy of the form should be attached to the record of trial.

Assuming these Booker warnings have been given (proper advice and recording of election/waivers), evidence of the summary court-martial will be admissible at a later trial by court-martial.

#### Final Pretrial Preparation

After the pretrial interview, the summary court officer determines whether the accused has decided to accept or refuse trial by summary court-martial. If the accused needs more time to decide, it should be

<b>SUMMARY COURT-MARTIAL ACKNOWLEDGEMENT OF RIGHTS AND WAIVER</b>	
<p>I, _____, assigned to _____, acknowledge the following facts and rights regarding summary courts-martial:</p>	
<p>1. I have the right to consult with a lawyer prior to deciding whether to accept or refuse trial by summary court-martial. Should I desire to consult with counsel, I understand that a military lawyer may be made available to advise me, free of charge, or, I may consult with a civilian lawyer at my own expense.</p>	
<p>2. I realize that I may refuse trial by summary court-martial, in which event the commanding officer may refer the charge(s) to a special court-martial. My rights at a summary court-martial include</p>	
<p style="padding-left: 40px;">a. the right to confront and cross-examine all witnesses against me;</p>	
<p style="padding-left: 40px;">b. the right to plead not guilty and the right to remain silent, thus placing upon the government the burden of proving my guilt beyond a reasonable doubt;</p>	
<p style="padding-left: 40px;">c. the right to have the summary court-martial call, or subpoena, witnesses to testify in my behalf;</p>	
<p style="padding-left: 40px;">d. the right, if found guilty, to present matters that may mitigate the offense or demonstrate extenuating circumstances as to why I committed the offense(s); and</p>	
<p style="padding-left: 40px;">e. the right to be represented at trial by a civilian lawyer provided by me at my own expense, if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it.</p>	
<p>3. I understand that the maximum punishment that may be imposed at a summary court-martial is</p>	
<u>E-4 and below</u>  Confinement for 1 month 45 days' hard labor without confinement 60 days' restriction Forfeiture of 2/3 pay for 1 month Reduction to the lowest paygrade	<u>E-5 and above</u>  60 days' restriction Forfeiture of 2/3 pay for 1 month Reduction to next inferior paygrade

Figure 5-1.—Summary Court-Martial Acknowledgement of Rights and Waiver.

4. Should I refuse trial by summary court-martial, the commanding officer may refer the charge(s) to trial by special court-martial. At a special court-martial, in addition to those rights set forth above with respect to a summary court-martial, I would also have the following rights:

a. The right to be represented at trial by a military lawyer, free of charge, including a military lawyer of my own selection if he or she is reasonably available. I would also have the right to be represented by a civilian lawyer at my own expense.

b. The right to be tried by a special court-martial composed of at least three officers as members or, at my request, at least one-third of the court members would be enlisted personnel. If tried by a court-martial with members, two-thirds of the members, voting by secret written ballot, would have to agree in any finding of guilty, and two-thirds of the members would also have to agree on any sentence to be imposed should I be found guilty.

c. The right to request trial by military judge alone. If tried by a military judge alone, the military judge alone would determine my guilt or innocence and, if found guilty, he or she alone would determine the sentence.

5. I understand that the punishments that can be imposed at a special court-martial for the offense(s) presently charged against me are:

Discharge from the naval service with a bad conduct discharge (delete if inappropriate);

Confinement for \_\_\_\_\_ months;

Forfeiture of 2/3 pay per month for \_\_\_\_\_ months;

Reduction to the lowest enlisted pay grade (E-1).

Knowing and understanding my rights as set forth above, I (do) (do not) desire to consult with counsel before deciding whether to accept trial by summary court-martial.

Knowing and understanding my rights as set forth above (and having first consulted with counsel), I hereby (consent) (object) to trial by summary court-martial.

\_\_\_\_\_  
Signature of accused and date

\_\_\_\_\_  
Signature of witness and date

Figure 5-1.—Summary Court-Martial Acknowledgement of Rights and Waiver—Continued.

provided. If the case is to proceed, the witnesses or the description of other evidence that the accused wishes to present at trial should be identified. The summary court-martial officer arranges for a time and place to hold the open session of the trial. These arrangements are made through the legal officer, and the summary court officer notifies all personnel involved of the time and place of the first meeting.

The summary court-martial officer plans an orderly trial procedure to include a chronological presentation of the facts. Appendix IX, *MCM*, is a summary court-martial trial guide. The summary court-martial officer should follow it closely and precisely during the hearing. The admissibility and authenticity of all known evidentiary matters are determined and numbers assigned to all exhibits to be

offered at trial. The evidence reviewed by the summary court officer includes not only that contained in the original file but also any other relevant evidence discovered by other means. The summary court-martial officer has the duty to insure that all relevant and competent evidence in the case, both for and against the accused, is presented. It is the responsibility of the summary court officer to ensure that only legal and competent evidence is received and considered at the trial. The military rules of evidence apply to a summary court-martial and must be followed. Therefore, only legal and competent evidence received in the presence of the accused at trial can be considered in determining guilt or innocence. If a question regarding admissibility of evidence arises, the summary court officer may seek assistance from a Navy Legal Service Office in resolving the issue.

The summary court is authorized to issue subpoenas to compel the appearance at trial of civilian witnesses. In such a case, the summary court-martial officer follows the same procedure that a special or general court-martial trial counsel would follow.

### **SUMMARY COURT-MARTIAL: TRIAL PROCEEDINGS**

The actual trial procedure, while different from a special or general court-martial, is governed by the same principles and procedures. The major steps of the summary court-martial include the arraignment, motions, pleas, presentation of the evidence, and findings and sentence. Let's look at each of these steps individually.

#### **Arraignment**

The summary court-martial officer reads and shows the charges and specifications to the accused and, if necessary, explains them. The accused may waive the reading of the charges. The summary court-martial officer then asks the accused to plead to each charge and specification.

#### **Motions**

Before receiving pleas, the summary court-martial officer allows the accused to make motions to dismiss or for any other relief. When requested by the accused, the summary court-martial officer, in the interest of justice, takes appropriate action on behalf of the accused.

#### **Pleas**

When a not-guilty plea is entered, the summary court-martial officer proceeds to trial. If the accused pleads guilty to any offense, the summary court officer determines the providence of the plea. If the summary court officer doubts that the accused's plea of guilty was not voluntarily and understandingly made, or if at any time during the trial any matter inconsistent with the plea of guilty arises, the summary court-martial officer enters a not-guilty plea on behalf of the accused. If the accused refuses to plead, the summary court-martial officer enters a not-guilty plea. The accused may change any plea at any time before findings are announced.

#### **Presentation of Evidence**

Witnesses for the prosecution are called first and examined under oath. The accused is permitted to cross-examine these witnesses. The summary court-martial officer can aid the accused in the cross-examination process. The witnesses for the accused are then called and examined under oath. The summary court-martial officer then evaluates the evidence to prove or disprove the accused's guilt or innocence or to establish extenuating circumstances.

#### **Findings and Sentence**

The summary court-martial officer announces the findings and sentence to the accused in open session. If the sentence includes confinement, the summary court officer advises the accused of the right to apply to the convening authority for deferment of the sentence to confinement. If the accused is found guilty, he or she is informed of the right to submit matters to the convening authority within 7 days.

### **SPECIAL COURT-MARTIAL**

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**LEARNING OBJECTIVES:** Describe the creation and composition of the special court-martial. Determine the qualification of members and the military judge. Describe the referral of charges and how charges can be modified. Explain the special court-martial procedures.

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The special court-martial is the intermediate level court-martial created by the *Uniform Code of Military Justice*. The maximum penalties that an accused may receive at a special court-martial are generally greater



than those of a summary court-, but less than those of a general court-martial. The rights of an accused are also generally greater as the maximum penalties increase with each type of court-martial. The special court-martial is a court consisting of at least three members, a trial counsel, a defense counsel, and a military judge. The maximum punishment at a special court extends to a bad-conduct discharge, 6 months' confinement, forfeiture of two-thirds pay per month for 6 months, and reduction to paygrade E-1. This chapter will discuss the special court-martial in detail.

## **CREATION OF THE SPECIAL COURT-MARTIAL**

Article 23, *UCMJ* and JAGMAN 0120b prescribe who has the power to convene (create) a special court-martial. As with the summary court-martial, the power to convene a special court-martial is nondelegable, and in no event can a subordinate exercise such authority.

The commander of a unit embarked on a naval vessel who is authorized to convene a special court-martial should refrain from exercising such authority and defer instead to the wishes of the ship's commander.

Before any case can be brought before a special court-martial, it must be convened. The creation of a special court-martial is accomplished by the written orders of the convening authority.

Basically, the order is under command letterhead, is dated and serialized, and is signed personally by the convening authority. The order specifies the names and ranks of all members detailed to serve on the court. Signature titles such as "Acting Commanding Officer" and "Executive Officer" should not be used on legal documents, regardless of the validity of such titles on other administrative correspondence. When a proper convening order is executed, a special court-martial is created and remains in existence until dissolved.

## **COMPOSITION OF THE SPECIAL COURT-MARTIAL**

There are several configurations of a special court-martial, depending upon either the desires of the convening authority or the desires of the accused. The constitution of the court refers to the court's composition, that is, the personnel involved. The

composition of the types of special court-martial is discussed in the following paragraphs.

### **Three Members**

One type of special court-martial consists of a minimum of three members and counsel, but no military judge. Such a special court-martial can try any case referred to it but cannot adjudge a sentence (in enlisted cases) of more than 6 months' confinement, forfeiture of 2/3 pay per month for 6 months, and reduction to paygrade E-1. So, in ordinary circumstances, a punitive discharge from service may not be adjudged. When a three-member type court-martial is used, the convening authority must include in the referral block on the charge sheet that a bad conduct discharge (BBCD) is not an authorized punishment.

### **Military Judge and Members**

Another type of special court-martial involves counsel, at least three members, and a military judge. The role of the members is similar to that of a civilian jury. They determine guilt or innocence and impose sentence. The senior member is, in effect, the jury foreman, who presides during deliberations. The military judge functions like a civilian criminal court judge. He or she resolves all legal questions that arise and directs the trial proceedings. This form of special court-martial is authorized to adjudge a punitive discharge and has become fairly standard in the naval service.

### **Military Judge Alone**

The special court-martial consisting of a military judge alone is not created by a convening order, but by exercise of a statutory right of the accused. The accused has the right to request orally on the record or in writing, a trial by military judge alone (without members). Before choosing to be tried by judge alone, an accused is entitled to know who the judge will be. The trial counsel (prosecutor) may argue against a request for a judge-alone trial when presented. The judge rules on the request and, if the request is granted, the court members are dismissed for that case only. A court-martial so configured is authorized to impose a sentence extending to a punitive discharge.

## **CONSTITUTION OF THE COURT**

In order for a court-martial to properly try a case, it must have strict constitution. That is, it must have jurisdiction over the offense, the defendant, and a proper convening authority. A deficiency in any of these requisites makes the court powerless to adjudicate a case lawfully. The rules relating to constitution of the court must therefore be carefully observed.

## **QUALIFICATIONS OF MEMBERS**

The convening authority has the ultimate legal responsibility to select the court members; that authority cannot be delegated. The convening authority appoints as members only those personnel who, in his or her judgment, are best qualified by reason of age, education, training, experience, length of service, and judicial temperament. These factors, of course, vary with individuals and do not necessarily depend on the grade of the particular person. No person in arrestor confinement is eligible to be a court member. Similarly, no person who is an accuser, witness for the prosecution, or has acted as investigative officer or counsel in a given case is eligible to serve as a member for that case. Although the convening authority may choose from lists suggested by subordinates, the final decision on members of a court rests with the office of the convening authority.

### **Commissioned Officers**

The members of a special court-martial must, as a general rule, be commissioned officers. When the accused is an enlisted service member, non-commissioned warrant officers are eligible to be court members. No member of the court should be junior in grade to the accused if it can be avoided. Members of an armed force other than that of the accused may be used, but at least a majority of the members should be of the same armed force as the accused.

### **Enlisted Members**

An enlisted accused has a right to be tried by a court consisting of at least one-third enlisted members. The accused must ask for enlisted membership by a personally signed request either before the conclusion of a pretrial hearing (Article 39a, UCMJ), or before the assembly of the court at

trial, or make the request orally on the record. Enlisted persons assigned to the same unit as the accused may not serve on the court. Only those enlisted members assigned to other units may lawfully serve on the court. "Unit" means company, squadron, battery, ship, or similar sized element.

If enlisted members cannot be found to serve, the convening authority may direct the court to proceed with trial. Such actions should only be taken when enlisted service members cannot be assigned because of extraordinary circumstances. In such a case, the convening authority forwards to counsel a detailed explanation of the circumstances, and why the trial must proceed without enlisted members.

## **QUALIFICATIONS OF THE MILITARY JUDGE**

The military judge of a special court-martial must be a commissioned officer, a member of the bar of a Federal court, or the highest court of any state, and certified by the Judge Advocate General as qualified to be a military judge. A military judge qualified to act on general court-martial cases can also act in special court-martial cases.

## **REFERRAL OF CHARGES**

The process of referring a case to trial by special court-martial is essentially the same as that for referral to a summary court-martial. Thus, the principles that apply to the preliminary inquiry, preferral of charges, informing the accused, and receipt of sworn charges also apply to the special court-martial. As far as the referral process is concerned, the only essential difference between the referral of a summary and a special court-martial is the information contained in Block 14 on page 2 of the charge sheet.

### **Referral to Trial**

If, after reviewing the applicable evidence, and the convening authority determines that trial by special court-martial is warranted, he or she executes Section V of the charge sheet. In addition to the command data entered on the appropriate lines of Block 14, the convening authority indicates the type of court-martial, the court-martial assignment, and any special instructions. Block 14 is then personally signed by the convening authority or by personal order reflecting the signer's authority. It might serve well to recall that a clear and concise serial system is essential to proper referral. The referral should identify a particular court

to hear the case; that is, it should relate to a specific convening order. Care should be taken in preparing convening orders and referral blocks to avoid confusion and legal complications at trial.

### **Withdrawal of Charges**

Withdrawal of charges is a process in which the convening authority removes a court-martial case previously referred to it for trial. The convening authority cannot withdraw charges from one court and refer them to another without reason. These reasons are articulated in writing by the convening authority and included in the record of trial when the case is tried by the second court. The convening authority may withdraw charges for the purpose of dismissing them for any reason deemed sufficient. The withdrawal is accomplished by drawing a diagonal line across the referral block on page 2 of the charge sheet and having the convening authority initial the line-out. It is also advisable to write “withdrawn” across the endorsement and to date the action.

### **DISESTABLISHMENT OF THE COURT.—**

Perhaps the most frequent withdrawal problem is presented when the convening authority wants to disestablish the court and create another to take its place. This usually happens when several members have been transferred or when the particular court has been in existence for a long time and the convening authority wants to relieve the court. Such grounds are valid and constitute a “proper reason.” However, if evidence shows that a change was made because a convening authority was displeased with the leniency of a sentence or the number of acquittals, then the withdrawal would not be lawful. Whenever a new court relieves an old one, it creates a problem with respect to those cases previously referred to the old court and those now being referred to the new court. Remember, only the court to which a case is specifically referred can try it. The convening authority should withdraw each case from the old court (by lining out the referral block) and then referring the case to the new court. This action is accomplished by executing a new Block 14 referral on the charge sheet, indicating the serial number and date of the convening order that appoints the new court. The new referral should be taped (at the top) over the old lined-out referral to allow inspection of both referrals.

**CHANGE IN COURT: NO DISESTABLISHMENT.—** Sometimes a convening authority may have good cause for withdrawing a case from a court but

has no intention of disestablishing that court. For instance, one of several court panels may be backlogged, and the convening authority may wish to redistribute the pending cases. This action is accomplished by lining out and initialing the old referral block on the charge sheet and executing anew Block 14, referring the case to a new court. Again, the new Block 14 is taped over the old one to allow inspection of both referrals.

### **Amendment of Charges**

In some instances, an amendment to charges will necessitate further administrative action with respect to the charge sheet. Minor changes in the form of correction of typographical errors normally will require no more administrative action than lining out and initialing the erroneous data and substituting the correct data. If, on the other hand, the contemplated change involves any new person, offense, or matter not fairly included in the charges as originally preferred, the amended specification must go through the preferral-referral process or the accused can exercise his or her right to object to trial on the unsworn charges.

### **Additional Charges**

If, while awaiting trial on certain charges, an accused commits new offenses or if other previously-unknown offenses are discovered, an entirely new charge sheet must be prepared. Using the Special Instructions section of the Referral block, the convening authority states that the additional charges are to be tried together with the charges originally referred to the court-martial.

### **SPECIAL COURT-MARTIAL: TRIAL PROCEEDINGS**

It is not necessary that you have a complete understanding of the many and complex rules and procedures of the special court-martial. It is essential, however, that you have a general knowledge of the mechanics of the trial process. Although an infinite number of variations may exist in any particular case, the general arrangement includes service of charges, pretrial hearings, preliminary matters, arraignment, motions, and pleas.

## Service of Charges

In times of peace, no person can be brought to trial in any special court-martial until 3 days after formal charges have been served. In computing the 3-day period, you may not count the date of service or the date of trial. Sundays and holidays do count, however, in computing the statutory period. If the accused is served on Wednesday, he or she could not be tried before Sunday, and, as a practical matter, not before Monday. An accused can lawfully object to participating in trial proceedings before the 3-day waiting period has expired. The accused may, however, waive the 3-day period, so long as he or she understands the right and voluntarily agrees to go to trial earlier. At U.S. shore establishments, trials normally do not occur on the weekends. However, when ships are at sea or in overseas ports, trial is possible at any time, any day of the week.

The date charges are served upon the accused is reflected by the certificate in Block 15 of page 2 of the charge sheet. The trial counsel normally executes this certificate when he or she personally presents a copy to the accused. The trial counsel must personally serve the accused, even though the accused may have been previously informed of the charges. The service of the charge sheet may also be accomplished by the command at any time after referral as long as the accused is served personally.

## Pretrial Hearings

After the 3-day period has elapsed, the military judge may hold sessions of court without members to litigate motions, objections, and other matters not amounting to a trial of the accused's guilt or innocence. The accused may be arraigned and his pleas taken and determined at such a hearing. At such hearings, the judge, trial counsel, defense counsel, accused, and a reporter will be present. Several such hearings may be held if desired. These hearings are commonly referred to as Article 39(a) sessions.

## Preliminary Matters

At the initial pretrial hearing, the first order of business is to incorporate into the record those documents relating to the convening of the court and referral of the case for trial. Also, all oaths are administered. The convening order, the charge sheet, and any amendments to either document become matters of record at this point in the proceedings.

In addition, an accounting is made of all personnel required to be present. This accounting includes all persons named in the convening order, the counsel, the reporter, and the military judge. Also, all personnel qualifications are checked for the record.

## The Arraignment

The arraignment is the reading of charges to the accused and asking for the accused's plea. The arraignment is complete when the accused is asked to enter his or her plea. This stage is an important one in the trial. After arraignment, if the accused voluntarily absents himself or herself without authority or does not appear during court sessions, he or she may nevertheless be tried and, if the evidence warrants, convicted. The arraignment is also the cut-off point for adding charges to the trial. After arraignment, no new charges can be added without the consent of the accused.

## Motions

At arraignment, the military judge advises the accused that pleas are about to be requested and that if any motions are to be made, they should be presented. Many times motions such as attacking jurisdiction, sufficiency of charges, illegal pretrial confinement, and speedy trial will have already been litigated at a pretrial hearing. Nevertheless, the accused may decide to make additional motions and is allowed to do so. If there are motions, they are litigated at this time. If there are no motions, the trial proceeds.

## Pleas

The responses of the accused to each specification and charge are known as the pleas. The recognized pleas in military practice are guilty, not guilty, guilty of a lesser included offense, and under some circumstances, a conditional plea of guilty. Any other pleas (such as *nolo contendere*) are improper, and the military judge enters a plea of not guilty.

**NOT-GUILTY PLEAS.**— When not-guilty pleas are entered by the accused or by the court, the trial proceeds to the presentation of evidence. The prosecutor begins, followed by the defense.

**GUILTY PLEAS.**— When guilty pleas are entered or when the accused pleads guilty of a lesser included offense, the judge determines that such pleas are made knowingly and voluntarily and that the

accused understands the meaning and effect of such pleas. This process is known as providence. The military judge advises the accused (1) of the maximum sentence that can be imposed in his or her case; (2) that a plea of guilty is the strongest form of proof known to the law; and (3) that by pleading guilty the accused is giving up the right to a trial of the facts, the right against self-incrimination, and the right to confront and to cross-examine the witnesses. In addition, the judge explores the facts thoroughly with the accused to obtain an admission of guilt-in-fact to each element of the offense (or offenses) to which the pleas relate.

**CONDITIONAL PLEAS.**— With the approval of the military judge and the consent of the trial counsel, an accused may enter a conditional plea of guilty. The main purpose of a conditional plea is to preserve for appellate review certain adverse determinations which the military judge may make against the accused regarding pretrial motions. If the accused prevails on appeal, his or her conditional plea of guilty may then be withdrawn.

#### **Assembly of the Court**

After the accused enters pleas, the military judge assembles the court. The members enter the courtroom and the military judge announces that all parties are present, and the members are sworn. The court is then assembled. After assembly, the military judge may give preliminary instructions to the members. Any witnesses who are expected to be called are asked to leave the courtroom. The trial counsel restates the general nature of the charges in the case for the benefit of the members.

#### **Challenge Procedure**

When the court is composed of members, the next stage will involve a determination of the eligibility of court members to participate in the trial. Members may be asked questions individually or collectively. This procedure is called *voir dire*. This procedure determines whether or not a member is suitable to sit as a member of the court-martial.

Both trial and defense counsel is given an opportunity to question each member to see if grounds for a challenge exists. In this connection, there are two types of challenges: (1) challenges for cause, and (2) peremptory challenges. A challenge, if sustained by the judge, excuses the member from the trial. The law places no limit on the number of challenges for cause that can be made at trial, but the trial counsel and

counsel for the defense are each limited to only one peremptory challenge. A *peremptory challenge* is challenge that can be made for any reason.

#### **Case on the Merits**

At this point the military judge announces the plea of the accused. The trial counsel and defense counsel make an opening statement to the court before the presentation of evidence begins. After opening statements are made, the prosecution commences presenting his or her case-in-chief. Each party has full opportunity to present evidence. Ordinarily the following sequence is used:

- Presentation of evidence for the prosecution
- Presentation of evidence for the defense
- Presentation of prosecution evidence in rebuttal
- Presentation of defense evidence in surrebuttal
- Additional rebuttal evidence at the discretion of the military judge
- Presentation of evidence requested by the military judge or members

A trial does not have to follow that order of events. For example, the defense may elect to make its opening statement and present evidence for the defense after the prosecution has rested.

The testimony of witnesses is taken orally in open session. Each witness must testify under oath. After the witness is sworn, he or she is identified for the record. The party calling the witness conducts direct examination of the witness, followed by cross-examination of the witness by the opposing party. Redirect and recross-examinations are conducted as necessary followed by any questioning by the military judge or members. All documentary and real evidence is marked and introduced into evidence.

#### **Arguments on Findings**

After all evidence has been presented, the trial counsel makes arguments on findings. The trial counsel presents argument, followed by the defense counsel. In this stage the trial counsel is allowed to make another argument, rebutting anything that was brought up by the defense counsel. After all arguments are complete, the military judge instructs the members

on findings. The members then withdraw from the courtroom for deliberation.

If the court is composed of members, the president of the court will announce the findings. When there are no members, the judge announces findings. At a special court-martial, two-thirds of the members present at trial must agree on each finding of guilty. In computing the necessary number of votes to convict, a fraction is counted as one. Thus, on a court of five members, the number of voters required to convict is three and one-third, or, applying the rule, four votes. In a trial by military judge alone, the required number of votes is one: the judge's.

### **Pre-sentencing Procedure**

After findings of guilty have been announced, the prosecution and defense may present matters to aid the court-martial in determining an appropriate sentence. Such matters are ordinarily presented in the following sequence:

1. Service record data relating to the accused taken from the charge sheet
2. Personal data relating to prior service of the accused taken from the service record
3. Evidence of prior convictions, military or civilian
4. Evidence of rehabilitative potential

### **Extenuation and Mitigation**

The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation. Matters in extenuation of an offense explains the circumstances of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse. Matters in mitigation of an offense is introduced to lessen the punishment adjudged by the court-martial, or to furnish grounds for clemency.

The accused may testify, make an unsworn statement, both in extenuation or mitigation, or rebut matters presented by the prosecution. The accused must limit such testimony or statements to those specifications to which the accused has been found guilty.

### **Arguments on Sentence**

After introduction of matters relating to the sentencing, counsel for the prosecution and defense may argue for an appropriate sentence. Again, in a members trial, the military judge will instruct the members on sentencing. As with findings, two-thirds of the members must agree on a particular sentence. In a members trial, the president of the court will announce sentence; otherwise the military judge announces it. Immediately after sentencing, the military judge informs the accused of post-trial and appellate rights.

### **Adjournment**

The military judge adjourns the court-martial at the end of a trial of an accused or proceeds to try other cases referred to that court-martial.

### **Clemency**

After trial, any or all court members and the military judge may recommend that the convening authority exercise clemency to reduce the sentence, notwithstanding their vote on the sentence at trial.

## **THE GENERAL COURT-MARTIAL**

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*LEARNING OBJECTIVES:* Describe the pretrial investigation and identify the parties involved and explain the duties of each. Explain general court-martial proceedings.

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The general court-martial is the highest court in the military justice system. A general court may impose the greatest penalties provided by military law. The general court-martial is composed of a minimum of five members, a military judge, and lawyers for the government and the accused. In some cases, the court is composed of a military judge and counsel. The general court-martial is created by the order of a flag or general officer in much the same manner as the special court-martial is created by subordinate commanders. Before trial by general court-martial may lawfully occur, a formal investigation of the alleged offenses must be conducted and a report forwarded to the general court-martial convening authority. The pretrial investigation, often referred to as an Article 32 investigation, is normally convened by a summary court-martial convening authority. The next section

will discuss the legal requisites of the pretrial investigation,

## **THE PRETRIAL INVESTIGATION**

The formal pretrial investigation (Article 32, *UCMJ*) is the military equivalent of the grand jury proceeding in a civilian court. The pretrial investigation will formally inquire into the allegations contained in the charge sheet; it will secure information on how to dispose of the case, and aid the accused in defending against the evidence. Basically, this investigation is protection for the accused, but it is also useful for the prosecutor. The pretrial investigation will enable the prosecutor to test the case for its strength and determine whether to continue with the case or seek dismissal if too frail or groundless.

### **Authority to Direct**

The pretrial investigation may be directed by one authorized by law to convene a summary or higher level court-martial. As is true of all other forms of convening authority, the power to order the Article 32, *UCMJ* pretrial investigation resides in the office of the commander.

### **Mechanics of Convening**

When a summary court or higher convening authority receives charges against an accused that are serious enough to warrant trial by a general court, the convening authority directs a pretrial investigation. Written orders of the convening authority assign personnel to participate in the investigation. At the time the investigation is ordered, the charge sheet will have been completed up to, but not including, the Referral block on page 2. Unlike courts-martial, pretrial investigations are directed as required, and standing orders for such proceedings are inappropriate. And there is no separate referral of a case to a pretrial investigation, since the order creating the investigation amounts to a referral of the case. The original appointing order is forwarded to the investigating officer along with the charge sheet, allied papers, and a blank investigating officer's report form (DD Form 457).

### **Investigating Officer**

The pretrial investigation is a formal one-officer investigation into alleged criminal misconduct. The investigating officer must be a commissioned officer

who should be a major or lieutenant commander or above, or an officer with legal training. The advantages of appointing a judge advocate (when available) to act as the investigating officer are substantial, especially in view of the increasingly complex nature of the military judicial process. An accuser, prospective military judge, or prospective trial or defense counsel for the same case may not act as investigating officer. Further, the investigating officer must be impartial and cannot previously have had a role in inquiring into the offenses involved, such as the provost marshal or public affairs officer. But, prior knowledge of the facts alone will not disqualify a prospective investigating officer. If the investigating officer is biased by such knowledge, however, then he or she is not the impartial investigator required by law. The law requires an investigating officer who is mature, fair, and impartial. That such an officer be appointed is the responsibility of the convening authority. If an investigating officer who is not a lawyer seeks advice regarding the investigation, that advice should not be requested from one who is likely to prosecute the case.

### **Counsel for the Government**

While the pretrial investigation need not be an adversarial proceeding, current practice favors having the convening authority detail a lawyer to represent the interests of the government, especially when the investigating officer is not a lawyer. The assignment of a counsel for the government does not lessen the obligation of the investigating officer to investigate the alleged offenses thoroughly and impartially. As a practical matter, however, the presence of the lawyers representing the government and the accused do make the pretrial investigation an adversarial proceeding. During the investigation, the counsel for the government will present evidence to support allegations contained on the charge sheet, much like a prosecutor at trial.

### **Defense Counsel**

An accused has extensive rights to counsel at the pretrial investigation, as well as at the general court-martial. More specifically, an accused may be represented by civilian counsel and by a detailed military lawyer. The civilian counsel must be provided by the accused at no expense to the government. The detailed military lawyer must be certified in accordance with Article 27(b), *UCMJ*, and can be a military lawyer of his or her own choice at no cost if

such counsel is reasonably available. Detailed defense counsel at a pretrial investigation must be a certified lawyer and be designated by the appointing order. Individual counsel, military or civilian, is normally not detailed on the appointing order. An accused is not entitled to more than one military counsel in the same case,

### Reporter

There is no requirement that a record of the pretrial investigation proceedings be made other than the completion of the investigating officer's report. Accordingly, a reporter need not be detailed. It is common practice, however, to assign a reporter to

prepare a verbatim record, particularly in complex cases. When such a record is desired, the convening authority may detail a reporter, but this assignment is usually made orally and is not part of the appointing order.

### Appointing Order

The order directing a pretrial investigation may be drafted in any acceptable form so long as an investigation is ordered and an investigating officer and counsel are detailed. A suggested format is shown in figure 5-2.

<p style="text-align: center;">DEPARTMENT OF THE NAVY U.S. Naval Support Activity FPO New York, NY 09521-1000</p> <p style="text-align: right;">17 Jul 19CY</p> <p>In accordance with Rules for Courts Martial (R.C.M.) 405, Manual for Courts Martial (MCM), 1984, Commander Jon T. Boate, JAGC, U.S. Navy, is hereby appointed to investigate the attached charges preferred against Seaman Very C. Pistol, U.S. Navy. The charge sheet and allied papers are appended hereto. The investigating officer will be guided by the provisions of R.C.M. 405, MCM, 1984, and current case law relating to the conduct of pretrial investigations. In addition to the investigating officer hereby appointed, the following personnel are detailed to the investigation for the purposes indicated:</p> <p style="text-align: center;">COUNSEL FOR THE GOVERNMENT</p> <p>Lieutenant Jane B. Doe, JAGC, U.S. Naval Reserve, certified in accordance with Article 27(b), Uniform Code of Military Justice.</p> <p style="text-align: center;">DEFENSE COUNSEL</p> <p>Lieutenant Mary (N) Christmas, JAGC, U.S. Naval Reserve, certified in accordance with Article 27(b), Uniform Code of Military Justice.</p> <p style="text-align: right;">WATER T. DOOR Captain, U.S. Navy Commanding Officer U.S. Naval Support Activity Naples, Italy</p>
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Figure 5-2.—Sample Appointing Order for Article 32 Pretrial Investigation.



## **PREPARATION FOR PRETRIAL HEARING**

When the pretrial investigation officer receives his or her orders of appointment, the charge sheet and allied papers should first be studied to become thoroughly familiar with the case. The charge sheet should be reviewed for errors and any needed corrections noted. The pretrial investigation officer should consult the accused, counsel, and the legal officer of the convening authority to set up a specific hearing date.

### **Hearing Date**

Once the preheating preparation has been completed, the pretrial investigation officer should convene the hearing. The pretrial investigation is a public hearing and should be held in a place suitable for a quasi-judicial proceeding. All parties should be present; the accused, lawyers, a reporter (if one is used), and witnesses. But witnesses must be examined one-by-one, and no witness should be permitted to hear another testify.

### **Witnesses**

All reasonably available witnesses necessary for a thorough and impartial investigation are required to be called before the Article 32 investigation. Transportation and per diem expenses are provided for both military and civilian witnesses. Witnesses are “reasonably available” and must testify when the significance of the testimony outweighs the difficulty, expense, delay, and effect on military operations. This balancing test means, therefore, as the importance of the testimony increases, a greater difficulty, expense, delay, or effect on military operations can be withstood. Similar considerations apply to the production of documentary and real evidence.

For both military and civilian witnesses, the pretrial investigation officer makes the initial determination concerning availability. For military witnesses, the immediate commanding officer of the witness may overrule the pretrial investigation officer’s determination. The decision not to make a witness available is subject to review by the military judge at trial.

A civilian witness whose testimony is material must be invited to testify. But he or she cannot be subpoenaed or otherwise compelled to appear at the investigation. Thus, the pretrial investigation officer should make a bona fide effort to have such civilian

witnesses appear voluntarily, offering transportation expenses and a per diem allowance.

### **Statements**

The pretrial investigation officer has a number of alternatives to live testimony. When a witness is not reasonably available, and even if the defense objects, the pretrial investigation officer may consider sworn statements of witnesses. Unless the defense objects, a pretrial investigation officer may also consider, regardless of the availability of the witness, sworn and unsworn statements, prior testimony, and offers of proof of expected testimony of that witness.

Upon objection, only sworn statements may be considered. Since objections to unsworn statements are generally made, every effort should be made to get sworn statements. All statements considered by the pretrial investigation officer should be shown to the accused and counsel. The same procedure should be followed with respect to documentary and real evidence.

### **Testimony**

All testimony given at the pretrial investigation must be given under oath and is subject to cross-examination. The accused has the right to offer either sworn or unsworn testimony. Also, the statements of witnesses who testify at the hearing should be obtained under oath if undue delay will not result. For this purpose, the pretrial investigation officer is authorized to administer oaths.

### **Rules of Evidence**

The rules of evidence applicable to trial by court-martial do not strictly apply at a pretrial investigation. And the pretrial investigation officer need not rule on objections raised by counsel except in procedural matters. This normally means that objections of counsel are merely noted on the record. Since the rules of evidence do not strictly apply, cross-examination of witnesses maybe very broad and searching and should not be unduly restricted.

### **Post-hearing Procedures**

After the hearing is completed, the investigating officer’s report (DD Form 457) is prepared and submitted to the commanding officer who directed the investigation. The commanding officer considers the investigating officer’s recommendation as to

disposition, but may dispose of the charges as he or she sees fit. If the commanding officer deems a general court-martial is appropriate but lacks the authority to convene such a court-martial, then the report must be forwarded to the area coordinator unless otherwise directed from the general court-martial convening authority in the commanding officer's chain of command.

Forwarding of the report is accomplished by endorsement that includes the recommendation of the officer directing the pretrial investigation, the recommendations of the investigating officer, a detailed chronology of events in the case, and any comments deemed appropriate. A sample endorsement is shown in figure 5-3.

If the command who ordered the investigation is also a general court-martial convening authority, he or she may refer the case to trial by general court-martial if the charges are warranted by the evidence and such disposition is appropriate.

## Pretrial Advice

Before a case is referred to a general court-martial, the convening authority's staff judge advocate must review the case and prepare a written legal opinion on the sufficiency of the evidence and advisability of trial. This written legal opinion is referred to as the pretrial advice.

The pretrial advice of the staff judge advocate includes a written and signed statement of the following:

- Whether each specification on the charge sheet alleges an offense under the UCMJ
- Whether each allegation is substantiated by the evidence indicated in the Article 32 report of investigation
- Whether a court-martial would have jurisdiction over the accused and the offense(s)

DEPARTMENT OF THE NAVY  
Naval Education and Training  
Program Management Support Activity  
Pensacola, Florida 32509

17 April 19CY

FIRST ENDORSEMENT on LCDR Jack R. Frost, JAGC, USN  
Investigating Officer's Report of 13 April CY

From: Commanding Officer, Naval Education and Training Program  
Management Support Activity

To: Chief of Naval Education and Training

Subj: ARTICLE 32 INVESTIGATION ICO SEAMAN ABLE B. SEAMAN, USN,  
111-11-1111

1. Forwarded.
2. Recommend trial by general court-martial.

PAUL T. BOATE

Figure 5-3.—Sample endorsement on Article 32 investigating officer's report.

- A recommended action to be taken by the convening authority

The staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. Another person may prepare the advice, but the staff judge advocate is responsible for it and must sign it personally.

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter and endorsements, and report of investigation are forwarded with the pretrial advice. When appropriate, the pretrial advice should include a brief summary of the evidence, discussion of significant aggravating, extenuating, or mitigating factors, and any other recommendations. There is no legal requirement to include such information, however, and the failure to do so is not an error. Lastly, it should be noted that the legal conclusions reached by the staff judge advocate are binding on the convening authority, whereas the recommendation is not.

## **GENERAL COURTS-MARTIAL-TRIAL PROCEEDINGS**

As you have just learned, there are prerequisites to convening a general court-martial. Once an Article 32 investigation has been conducted and a case is referred to a general court-martial, the actual procedure is the same as that of a special court-martial. However, there are some differences in composition and qualification of parties.

### **Who May Be Tried**

A general court-martial may try any person subject to the *UCMJ* for any offense made punishable under the code. General courts-martial may also try any person for a violation of Articles 83, 104, and 106. Upon a finding of guilty of an offense, general court-martials may, within limits prescribed in the *MCM*, adjudge any punishment authorized under R.C.M. 1003.

### **The Death Penalty**

The death penalty may not be adjudged if not specifically authorized for the offense, or if the case has been referred as noncapital. A general court-martial composed only of a military judge may not try any person for a capital offense, again, unless

the case has been referred as noncapital. In essence, this means the death penalty may not be ordered by a military judge alone, it must be imposed by a court composed of members.

### **The Military Judge**

The military judge of a general court-martial is designated for such duties by the Judge Advocate General, certified for duty as a military judge of a general court-martial and is assigned and directly responsible to the Judge Advocate General.

### **Who May Serve**

There is no special requirement for a person to act as a member in a general court-martial. But in the general court-martial there must be a minimum of five members appointed. And if the accused elects to be tried by a court composed of enlisted members, then the general court must consist of at least two enlisted members.

### **The Defense Counsel**

The requirement for a defense counselor associate to be certified under Article 27(b), *UCMJ* is the same in both the special and general court-martial. However, in the special court-martial the trial counsel need only be a commissioned officer, whereas in a general court-martial the trial counsel must be a person certified by the Judge Advocate General to perform such duties.

## **COURTS-MARTIAL PUNISHMENTS**

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**LEARNING OBJECTIVES:** Define authorized punishments and identify the primary references for punishment authority. Explain when increased punishments are allowed, and describe maximum punishments and prohibited punishments.

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Articles 19, 55, and 56, *UCMJ*, R.C.M. 1003 and appendix 12, and Part IV, *MCM*, 1984 are the primary references concerning punishment authority. Part IV of the *MCM* contains the maximum permissible punishment for a particular offense. The other references further limit punitive authority, depending on the level of court-martial and type of punishment being considered.

## AUTHORIZED PUNISHMENTS

Punishments are determined by statutory provisions or by the President of the United States under the authority delegated by Article 56, *UCMJ*. An accused, as a general rule, may be separately punished for each offense convicted, unlike non-judicial punishment where only one punishment is imposed for all offenses. Thus, an accused convicted of unauthorized absence (Art. 86), assault (Art. 128), and larceny (Art. 121) is subject to a maximum sentence determined by totaling the maximum punishment for each offense. Summary court-martial punishments were discussed earlier as part of the

advice to the accused. Table 5-1 illustrates authorized punishments for all three types of courts-martial. Now let's consider some of the punishments listed in table 5-1.

### Bad-Conduct Discharge

A special court-martial is empowered to sentence an enlisted accused to separation from the service with a bad-conduct discharge (BCD). This is true provided the discharge is authorized for one or more of the offenses for which the accused stands convicted, or by virtue of an escalator clause (discussed later). A special court-martial is not authorized to sentence any

Table 5-1.—Authorized Punishments.

Punishment	Summary		Special		General		
	E-4 & Below	E-5 & Above	E n l i s t e d	O f f i c e r	E n l i s t e d	W a r r a n t	O f f i c e r
Death	No	No	No	No	<sup>1</sup> Yes	<sup>1</sup> Yes	<sup>1</sup> Yes
Dismissal	No	No	No	No	No	No	Yes
Dishonorable Discharge	No	No	No	No	Yes	Yes	No
Bad-Conduct Discharge	No	No	Yes	No	Yes	No	No
Confinement	30 days	No	6 mo	No	<sup>5</sup> Yes	<sup>5</sup> Yes	<sup>5</sup> Yes
Solitary Confinement	No	No	No	No	No	No	No
Confinement on bread and water or diminished rations	<sup>2</sup> 3 days	No	<sup>2</sup> 3 days	No	<sup>2</sup> 3 days	No	No
Restriction	2 mo	2 mo	2 mo	2 mo	2 mo	2 mo	2 mo
Hard labor w/o confinement	45 days	No	3 mo	No	3 mo	No	No
Forfeiture all pay and allowances	No	No	No	No	Yes	Yes	Yes
Forfeiture 2/3 pay per month	<sup>3</sup> 1 mo	<sup>3</sup> 1 mo	6 mo	6 mo	<sup>5</sup> Yes	Yes	Yes
Fine	<sup>4</sup> Yes	<sup>4</sup> Yes	<sup>4</sup> Yes	<sup>4</sup> Yes	Yes	Yes	Yes
Reduction to next inferior rate	Yes	Yes	Yes	No	Yes	No	No
Reduction to lowest paygrade	Yes	No	Yes	No	Yes	No	No
Loss of numbers	No	No	No	Yes	No	Yes	Yes
Reprimand	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<sup>1</sup> Where authorized or mandatory <sup>2</sup> If attached to or embarked in a naval vessel <sup>3</sup> May extend payment up to 3 months (JAGMAN, 0019b) <sup>4</sup> If given, a fine or a fine and forfeiture combination may not exceed the maximum amount of forfeiture which may be adjudged in a case <sup>5</sup> Maximum punishment listed for each offense in Part IV, MCM							

officer or warrant officer to separation from the service. A BCD is a separation from the service under other than honorable conditions, and is designed as a punishment for bad conduct rather than as a punishment for serious military or civilian offenses. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears necessary.

The practical effect of this type of separation is less severe than a dishonorable discharge, where the accused automatically becomes ineligible for almost all veteran's benefits. The effect of a BCD on veteran's benefits depends upon whether it was adjudged by a general or a special court-martial, whether the benefits are administered by the service concerned or by the Veteran's Administration, and upon the particular facts of a given case.

### **Confinement**

Confinement involves the physical restraint of an adjudged service member in a brig, jail, or prison. Under military law confinement automatically includes hard labor, but the law prefers that the sentence be stated as confinement, omitting the words *at hard labor*. Omission of the words *hard labor* does not relieve the accused of the burden of performing hard labor. A special court-martial can adjudge 6 months' confinement upon an enlisted service member, but may not impose any confinement upon an officer or warrant officer. Part IV, *MCM*, limits this punishment to an even lesser period for certain offenses. As an example, failure to go to appointed place of duty (Art. 86) has a maximum confinement punishment of only 1 month.

### **Confinement on Bread and Water/Diminished Rations**

As its name suggests, this punishment involves confinement coupled with a diet of bread and water or diminished rations. When on a diet of bread and water, the accused is allowed as much bread and water as he or she wants. Diminished rations is food from the regular daily rations, constituting a nutritionally balanced diet, but limited to 2100 calories per day. No hard labor may be required to be performed by an accused undergoing this punishment. Confinement on bread and water/diminished rations may be imposed only upon enlisted persons in paygrades E-1 to E-3 who are attached to or embarked in a vessel, and then for a maximum of only 3 days. Both the prisoner and

the confinement facility must be inspected by a medical officer who must certify in writing that the punishment will not be injurious to the accused's health and that the facility is medically adequate for human habitation.

### **Restriction**

*Restriction* is a moral restraint upon the accused to remain within certain specified limits for a specified time. Restriction may be imposed on all persons subject to the *UCMJ*, not to exceed 2 months. Restriction is a less severe form of punishment than confinement or hard labor without confinement, and may be combined with any other punishment. The performance of military duties can be required while an accused is on restriction.

### **Hard Labor Without Confinement**

This form of punishment is performed in addition to routine duties and may not lawfully be used in lieu of regular duties. The number of hours per day and character of the hard labor will be designated by the immediate commanding officer of the accused. The maximum amount of hard labor that can be adjudged at a special court-martial is 3 months. This punishment can be imposed on enlisted personnel, but not officers or warrant officers. After each day of hard labor, the accused should then be permitted normal liberty or leave. Hard labor means rigorous work but not so rigorous as to be injurious to health. Hard labor cannot be required on Sundays, but may be performed on holidays. Hard labor can be combined with any other punishment.

### **Forfeiture of Pay**

This kind of punishment involves withholding a specified amount of pay for a specific number of months. The maximum amount that is subject to forfeiture at a special court-martial is two-thirds of 1 month's pay per month for 6 months. The forfeiture must be stated in terms of pay per month for a certain number of months. The basis for computing the forfeiture is the base pay of the accused plus sea and foreign duty pay. Other pay and allowances cannot be considered for forfeiture. If the sentence is to include reduction in grade, the forfeiture must be based upon the grade to which the accused is to be reduced. A forfeiture may be imposed by a special court-martial upon all military personnel. The forfeiture applies to pay becoming due after the forfeitures have been

imposed and not to monies already paid to the accused. Unless suspended, forfeitures take effect on the date executed by the convening authority.

## **Fine**

A fine is a lump sum judgment against the accused requiring him or her to pay money to the United States. A fine is not taken from the accruing pay, as with forfeitures, but becomes due in one payment when the sentence is executed. To enforce collection, a fine may also include the provision that in the event the fine is not paid, the accused must be confined for a period of time. The total period of confinement may not exceed the jurisdictional limit of the specified court-martial should the accused fail to pay the fine. While a special court-martial can impose a fine upon all personnel, the punishment should not be adjudged unless the accused has been unjustly enriched by his or her crimes. A fine cannot exceed the total amount of money that the court could have required to be forfeited. The court may, however, award both a fine and forfeitures, so long as the total monetary punishment does not exceed the amount that could have been required to be forfeited.

## **Reduction in Grade**

Reduction in grade takes away the paygrade of an accused and places him or her in a lower paygrade. Therefore, this punishment can only be used against enlisted persons in other than the lowest paygrade. Officers may not be reduced in grade. A special court-martial may reduce an enlisted service member to the lowest paygrade regardless of grade before sentencing. A reduction can be combined with all other forms of punishment.

In accordance with the power granted in Article 58(a), *UCMJ*, the Secretary of the Navy has determined that automatic reduction will be effected in accordance with JAGMAN 0152d. Under the provisions of this section, a court-martial sentence of an enlisted member (in a paygrade above E-1), that includes a punitive discharge or confinement in excess of 90 days or 3 months automatically reduces the member to the paygrade of E-1 as of the date the sentence is approved. The convening authority or supervisory authority may retain the accused in the paygrade held at the time of sentence or at an intermediate paygrade and suspend the automatic reduction to paygrade E-1. Additionally, the convening authority may direct that the accused serve in paygrade E-1 while in confinement, but be returned

to the paygrade held at the time of sentencing or an intermediate paygrade upon release from confinement. Failure of the convening authority to address automatic reduction will result in the automatic reduction to paygrade E-1.

## **Loss of Numbers**

The dropping of an officer a stated number of places on the lineal precedence list is called loss of numbers. Lineal precedence is lost for all purposes except consideration for promotion. This exception prevents the accused from avoiding or delaying being passed over. Loss of numbers does not reduce an officer in grade, nor does it affect pay or allowances. Loss of numbers may be adjudged in the case of commissioned officers, warrant officers, and commissioned warrant officers. This punishment may be combined with all other punishments.

## **Punitive Reprimand**

A special court-martial may also adjudge a punitive reprimand against anyone subject to the *UCMJ*. A reprimand is nothing more than a written statement criticizing the conduct of the accused. In adjudging a reprimand, the court does not specify the wording of the statement but only its nature. JAGMAN 0152c contains guidance for drafting the reprimand.

## **CIRCUMSTANCES PERMITTING INCREASED PUNISHMENTS**

There are three situations in which the maximum limits of Part IV, *MCM*, may be exceeded. These are known as the “escalator clauses” and are designed to permit a punitive discharge in cases involving chronic offenders. In no event, however, may the so-called escalator clauses operate to exceed the jurisdictional limits of a particular type of court-martial. With respect to a special court-martial, these three clauses have the following impact.

### **Three or More Convictions**

If an accused is convicted of an offense for which Part IV, *MCM*, does not authorize a dishonorable discharge, proof of three or more previous convictions by court-martial during the year preceding the commission of any offense of which the accused is convicted will allow a special court-martial to adjudge a bad conduct discharge, forfeiture of 2/3 pay per

month for 6 months and confinement for 6 months, even though that much punishment is not otherwise authorized. In computing the 1-year period, any unauthorized absence time is excluded.

### **Two or More Convictions**

If an accused is convicted of an offense for which Part IV, *MCM*, does not authorize a punitive discharge, proof of two or more convictions within 3 years preceding the commission of any of the current offenses will authorize a special court-martial to adjudge a bad conduct discharge, forfeiture of 2/3 pay per month for 6 months, and, if the confinement authorized by the offense is less than 3 months, confinement for 3 months. For purposes of the second escalator clause, periods of unauthorized absence are excluded in computing the 3-year period.

### **Two or More Offenses**

If an accused is convicted of two or more separate offenses, none of which authorizes a punitive discharge, and if the authorized confinement for these offenses totals 6 months or more, a special court-martial may adjudge a bad-conduct discharge and forfeiture of 2/3 pay per month for 6 months.

## **JURISDICTIONAL MAXIMUM PUNISHMENT**

In no case can a special court-martial lawfully adjudge a sentence in excess of a bad conduct discharge, confinement for 6 months, forfeiture of 2/3 pay per month for 6 months, and reduction to paygrade E-1. But there are many lesser forms of punishment within these limits that may be adjudged.

## **PROHIBITED PUNISHMENTS**

Article 55, *UCMJ*, flatly prohibits flogging, branding, marking, tattooing, the use of irons (except for safekeeping of prisoners), and any other cruel and unusual punishment. Other punishments not recognized by service customs include shaving the head, tying up by hands, carrying a loaded knapsack, placing in stocks, loss of good conduct time (a strictly administrative measure), and administrative discharge.

## **DEMEANOR ON WITNESS STAND**

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**LEARNING OBJECTIVES:** Identify 12 suggestions offered to help you conduct yourself properly on the witness stand. Explain the purpose of 11 tactics used by counsel, and give an example of each and your response.

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As a Master-at-Arms, you undoubtedly will be called upon to testify in court. Remember that a court expects a more precise account from a patrolperson or investigator than from other witnesses. The following suggestions are offered to help you conduct yourself so that you will feel at ease and can direct all your efforts toward presenting your testimony:

- Wear the proper uniform.
- Be punctual.
- Remain calm; don't permit yourself to get confused or upset.
- Tell the truth; don't conceal any facts concerning inquiries about the case.
- You can testify only to what you know to be fact. Hearsay is secondhand information; it is not what you know personally, but what someone else told you.
- Tell your story in your own way. Use plain language that is within the everyday experience and vocabulary of the members of the court or jury. Speak slowly, clearly, and distinctly. Always try to convey thoughts or pictures (not just words) to the court.
- If you make a mistake, no matter how slight, correct it. This method may save you much embarrassment later if the testimony of other witnesses differs from yours.
- Your attitude toward the court should always be respectful. Do not regard the lawyer who cross-examines you as the enemy.
- Remember: There is no hurry; take your time while testifying. The judge and members of a court-martial are anxious to hear what you have to say. They need all the information you can give.
- Limit your answers to the questions asked; do not volunteer information. Don't talk too much.

- Keep your wits about you so you won't make mistakes and get fouled up on cross-examination. The opposing lawyer probably will make you repeat your testimony, hoping you will contradict or discredit your earlier statements. Know the facts, testify to them, and do not change your testimony.
- Before you appear in court, carefully review what you know about the case, run over the facts, and mentally arrange them in proper sequence. As a result, you will be more confident of your ability to do a good job.

Some common tactics used by defense counsels during cross-examinations and the actions you should take are included in table 5-2.

### **MASTER-AT-ARMS DUTIES AT COURTS-MARTIAL, AND COURTS OF INQUIRY**

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*LEARNING OBJECTIVES:* Describe the usual duties of Master-at-Arms at courts-martial and courts of inquiry.

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There are no prescribed duties for Masters-at-Arms at courts-martial or courts of inquiry. Usually each command sets its own procedures and directives for personnel assigned.

The following are some of the duties you may encounter and with which you should be familiar.

### **GUARDING PRISONERS**

You may be assigned duties of guarding military prisoners in court. When performing this duty, station yourself in a position so you can observe the prisoner at all times. Remain close enough to prevent the prisoner from injuring himself or others. You may also be required to ensure that the accused, witnesses, and interested parties are present. There may be times you will be stationed outside the courtroom, summoning witnesses. In either instance, remain alert and ensure that quiet is maintained in the immediate area.

When appropriate, a guard is detailed to ensure proper custody of the accused and to assist the court in preserving order and decorum. Unless otherwise directed by the trial judge, guards are not permitted inside the bar of the courtroom. Arms or weapons, except when they are to be exhibits or when otherwise

authorized by the trial judge, are not allowed inside the courtroom.

Prisoners being tried may be delivered in handcuffs if circumstances warrant. If so, the cuffs are removed during the proceedings.

Upon completion of the court and depending on the sentence awarded, the MA may take charge of the accused immediately upon sentencing.

Arrangements for the location of witnesses and the placement of the Master-at-Arms should be coordinated with the trial counsel.

## **COURT BAILIFF**

Masters-at-Arms may also be assigned to duties of a court bailiff. A bailiff should be present at every trial to announce the opening and closing of the court, to obtain witnesses as they are called to testify, to ask everyone to rise when the trial judge enters or leaves the courtroom, and to take care of administrative errands during the trial. The trial counsel is responsible for briefing the bailiff as to his or her duties.

### **Duties of the Bailiff**

The bailiff may look to the trial counsel for specific instruction as to his or her duties and for directions before and after each session of the court. While the court is in session, the bailiff is under the supervision of the military judge and will assist the military judge and counsel in the conduct of an orderly trial. The bailiff should be familiar with the location of the principal offices and facilities, such as the library, within the law complex.

The following is a list of the duties of a court bailiff:

- The bailiff reports to the trial counsel in the uniform of the day with duty belt and appropriate cover at least 30 minutes before the beginning of each day's proceedings. Thereafter the bailiff reports to the military judge 15 minutes before the beginning of the day's proceedings.

- The bailiff sees that the courtroom, including the spectator area and the deliberation room for court members, has a neat and orderly appearance and will arrange the furniture properly.



**Table 5-2.—Cross Examination Tactics**

<u>COUNSEL'S TACTIC</u>	<u>EXAMPLE</u>	<u>PURPOSE</u>	<u>YOUR RESPONSE</u>
Rapid fire questions	One question after another with little time to answer.	To confuse you; an attempt to force inconsistent answers.	Take time to consider the question; be deliberate in answering; ask to have the question repeated; remain calm.
Condescending counsel	Benevolent in approach, over-sympathetic in his or her questions to the point of ridicule.	To give the impression that you are inept, lack confidence, or may not be a reliable witness.	Firm decisive answers, asking for the question to be repeated if improperly phrased.
Friendly counsel	Very courteous, polite; questions tend to take you into his or her confidence.	To lull you into a false sense of security where you will give answers in favor of the defense.	Stay alert, bear in mind that the purpose of defense is to discredit or diminish the effect of your testimony.
Badgering, beligerent	Counsel staring you right in the face, shouts, "That is so, isn't it?"	To make you angry so that you lose your sense of logic and calmness. Generally, rapid questions will also be included in this approach.	Stay calm, speak in a deliberate voice giving trial counsel time to make appropriate objections.
Mispronouncing your name; using wrong rank	Your name is Jansen; counsel calls you Johnson.	To draw your attention to the error in pronunciation rather than enabling you to concentrate on the question asked so that you will make inadvertent errors in testimony.	Ignore the mispronouncement and concentrate on the question counsel is asking.
Suggestive question (tends to be a leading question allowable on cross-examination).	Was the color of the car blue?	To suggest an answer to counsel's question in an attempt to confuse or to lead you.	Concentrate carefully on the facts, disregard the suggestion. Answer the question.
Demanding a "yes" or "no" answer to a question that needs explanation.	Did you strike the defendant with your club?	To prevent all pertinent and mitigating details from being considered by the jury.	Explain the answer to the question, if stopped by counsel demanding a "yes" or "no" answer, pause until the court instructs you to answer in your own words.
Reversing your words	You answer, "The acciderrt occurred 27 feet from the intersection." Counsel says, "You say the accident occurred 72 feet from the intersection?"	To confuse you and demonstrate a lack of confidence in you.	Listen intently whenever counsel repeats back something You have said. If he makes an error, correct him.
Repetitious questions	The same question asked several times slightly rephrased.	To obtain inconsistent or conflicting answers from you.	Listen carefully to the question and state, "I have just answered that question."
Conflicting answers	But, Petty Officer Smith, Chief Brown just said, etc.	To show inconsistency in the investigation. This tactic is normally used on measurements, times, etc.	Remain calm. Conflicting statements have a tendency to make a witness extremely nervous. Be guarded in your answers on measurements, times, etc. Unless you have exact knowledge, use the term "approximately". Refer to your notes.
Staring	After you have answered, counsel just stares as though there were more to come.	To have a long pause that one normally feels must be filled thus saying more than necessary. To provoke you into offering more than the question called for.	Wait for the next question.

- The bailiff ensures that the judge has the desk supplies desired and that the court members have pencils and pads of voting paper in their deliberation room.

- When counsel for both sides, the accused, the reporter, and, when appropriate, the court members, are all present in the courtroom, the bailiff notifies the military judge and escorts him or her to the courtroom. When entering the courtroom, the bailiff states: "All persons please rise." When the military judge announces a recess or adjournment, the bailiff again states: "All persons please rise." If need be, he or she will also instruct the spectators to stand fast until the military judge has departed from the courtroom. The military judge will advise the bailiff in the event there is to be any departure from this procedure.

- According to the instructions of the military judge, the court will be formally opened at the beginning of each day of the trial at which spectators are in attendance. On those occasions, the bailiff states:

All persons please rise. A (general) (special) court-martial convened by \_\_\_\_\_ is now in session, Military Judge (Captain) (Colonel) (Commander) ( ) U.S. (Navy) (Marine Corps) presiding.

- When the court members enter the courtroom and also when the court members stand to be sworn, the bailiff will announce, "Everyone, please stand," in a voice that can be heard by all spectators (unless advised of a different procedure by the judge).

- The bailiff should be aware that military trials are open and that spectators and members of the news media are welcome in the courtroom to hear and observe the trial proceedings (unless otherwise instructed by the judge). The bailiff should see that they can enter the courtroom, be seated, and leave quietly while the court is in session.

- As the law does not permit picture taking or any type of broadcasts in the courtroom, the bailiff will not permit that type of equipment to be taken into the courtroom. Any problems concerning this matter should be brought to the attention of the trial counsel.

- Courtroom rules do not permit spectators to eat, sleep, smoke, or engage in conversation while the court is in session. The bailiff should quietly and diplomatically inform the offenders of these rules.

- Anyone talking or making noise in the halls that distracts from the proceedings in the courtroom will be told by the bailiff that court is in session.

- Rowdiness and violence are not unknown in the courtroom. The bailiff must be alert and prepared to take immediate steps to suppress unruly behavior.

- When the court members are in closed session, only the members may be permitted in the deliberation room. Therefore, the bailiff will not enter that room or permit anyone else to enter during the closed session.

- The bailiff is the only contact between the court members and the parties to the trial during the periods the court members are deliberating. The bailiff will be available to the court members outside their deliberation room and immediately notify the trial counsel, defense counsel, and military judge when the court members are ready for the court to be reopened.

- If the bailiff is instructed to deliver any item or message to the court members in closed session, he or she first informs the judge and obtains approval.

### Services of Bailiff

The bailiff will be prepared to furnish the following services:

- Summon the court members to the courtroom at the beginning of each session of court when advised by the military judge or trial counsel.

- Collect written questions from the court members upon the judge's request and hand them to the judge or trial counsel as instructed.

- Summon witnesses to the courtroom when requested by counsel.

- Deliver findings and sentence worksheets to the president of the court when instructed to do so.

- Deliver items of evidence to the deliberation room, if instructed to do so by the military judge, when the court members retire to the deliberation room.

- Perform administrative errands during the trial as requested by the military judge and trial and defense counsel.

### Conduct of Bailiff

The bailiff should remain neutral throughout the trial of a case and not assume a partisan attitude toward either the prosecution or the defense. The bailiff should never participate in any discussion of the merits of the case or attempt to predict the outcome of the trial. The bailiff should also avoid making any

comments on the performance of counsel for either side or on the testimony of witnesses.

## CIVIL COURT LIAISON

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*LEARNING OBJECTIVES:* List and explain the duties of a civilian court liaison.

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Depending on the size, location, and number of cases handled, Masters-at-Arms may be assigned to a civil court. The purpose of this assignment is to establish and maintain a good working relationship between armed forces personnel and civilian law enforcement agencies and the court.

Duties of civilian court liaison include:

- Learn of civilian offenses committed by military personnel, using all available resources
- Initiate reports as required; e.g., original reports on cases not reported to the patrol section plus needed supplemental reports
- Maintain a working file on each open case; ensure the destruction of each working file as a case is closed
- Place military detainees on service personnel confined by civil authorities who have military charges pending

- Attend sessions of criminal and traffic courts whenever military offenders are tried and provide assistance to civil court and law enforcement personnel
- Accept custody of military personnel released by civil authorities and make appropriate disposition
- Keep concerned units advised of the status of those in civil confinement
- Act as liaison between individuals in confinement and the military
- Maintain a written record of visits made and units notified

## SUMMARY

In this chapter, we looked at the three different types of courts-martial, their creation, and the duties and qualifications of the personnel involved. We also covered advice to the accused regarding rights and right of counsel. Punishments that can be awarded in each court were covered, along with prohibited punishments. Suggestions for Master-at-Arms to improve their performance on the witness stand were given. Finally, the usual duties of Master-at-Arms at courts-martial and courts of inquiry were discussed, as well as the duties of a civilian court liaison.

